United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1300

Docket No. T-3130
74-1300

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

THOMAS MOORE, ET AL.
Appellant

v.

B

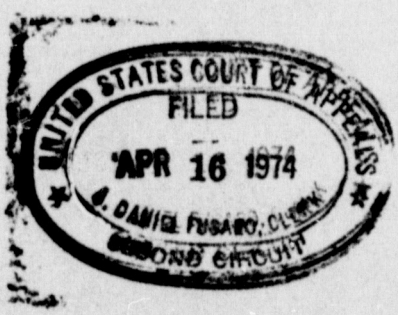
JOSEPH BETIT, ETC., ET AL.
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

OF THE DISTRICT OF VERMONT

Docket No. 73-2

BRIEF OF APPELLANT



DOUGLAS MOLDE, Esq.
Vermont Legal Aid, Inc.
54 Lake Street
St. Albans, Vermont 05478

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STATEMENT OF THE ISSUE

Jurisdiction in the District Court was premised under 28 USC §1331. The issue is whether the amount in controversy for the purpose of that statute between Plaintiffs, Vermont Welfare Rights Organization and Thomas Moore and Defendants exceeds Ten Thousand Dollars, exclusive of interests and costs.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Vermont participates in several categorical assistance programs created by the Social Security Act of 1935 as amended and receives matching federal funds for welfare and administrative expenditures. Vermont has a state plan governing the operation of these categorical Assistance Programs within the state. The contents of these plans are specified by statute and federal regulations issued by the Department of Health, Education and Welfare (HEW), the department administering the program.

Each title governing the categorical assistance programs and medicaid require among many other items that the state in its plan provide for the use of paid subprofessional staff with emphasis on the full-time or part-time employment of recipients of public assistance and other low income persons as

community service aides. [42 USC §§302(a)(5)(B), 602(a)(5)(B), 1202(a)(5)(B), 1352(a)(5)(B), 1382(a)(5)(B), and 1396a(a)(4)(B). These sections were added as a result of the Harris amendment P.L. 90-248 §210(a)(1).

HEW has promulgated regulations and guidelines to implement these requirements.

The Vermont Department of Social Welfare administers these categorical assistance and medicaid programs in Vermont. Thomas Moore and Vermont Welfare Rights Association by this suit sought to compell the Vermont Department of Social Welfare to hire welfare recipients and low-income persons as community service aides. Moore and Welfare Rights requested that the Court declare that Defendants Philbrook, Denny and Handy (Social Welfare) were in breach of their contractual obligations to hire and recruit such persons for subprofessional positions with the Department of Social Welfare and that they were in violation of applicable Federal Law.

Moore and Welfare Rights requested preliminary and permanent injunctions preventing Social Welfare from failing to perform its contractual and federal obligations to hire welfare recipients and low income persons for subprofessional positions.

Moore and Welfare Rights further requested that Social Welfare be required to submit not later than 30 days from the date of the Court's order an action program detailing Social Welfare's compliance with the Order and for such other relief as the Court might deem equitable and just.

II. PROCEEDINGS

Welfare Rights in a motion dated April 13, 1973 sought to intervene in the action originally brought by Moore on his own behalf and as a class action. By Order dated and filed July 27, 1973 Welfare Rights was granted permission to intervene.

Moore and Welfare Rights by motion accompanied by a Second Amended Complaint dated September 17, 1973 requested: to withdraw pending motions to amend their complaints, for leave to file a second amended complaint; to drop the class action allegations; to add a new defendant (Handy); and to substitute the present Commissioner of the Vermont Department of Social Welfare, Paul Philbrook, for his predecessor, Joseph Betit.

A hearing was held by the Court on these motions, Social Welfare's motions to dismiss for failure to state a claim upon which relief could be granted and

fpr lack of an amount in controversy greater than Ten Thousand ($10,000) exclusive of interests and costs.

The Court granted Moore and Welfare Rights' request to file the Second Amended Complaint.

III. DISPOSITION

The action was dismissed by an opinion and order dated December 27, 1973 and filed on the same day for lack of jurisdiction.

IV. FACTS

Thomas Moore resides in Swanton, Vermont. Thomas Moore and his present wife Beverly have 10 children seven of whom are dependents. A-33. Mr. Moore is the father of 4 girls and a boy by a previous marriage for whose support he contributes Ten ($10.00) dollars per week. A-33.

Mr. Moore is a recipient of ANFC-UF benefits. A-34. Moore applied to the Department of Personnel for a subprofessional job with the Department of Social Welfare. He received no response from them to this application. Subsequent to this application, he again applied for a subprofessional position with the Department of Social Welfare through his attorney, and was informed by the Department of Personnel that no

special subprofessional jobs existed as such on a priority basis for welfare recipients and low income persons. A-34.

Vermont Welfare Rights Association (Welfare Rights) is an organization which represents the interests of its members in respect to the various public assistance, general assistance and medical assistance programs in effect in Vermont. Members of the Welfare Rights Association are subjected to the policies complained of. A-35.

Defendants Philbrook, Denny and Handy are officials of the affected State Departments. A-35.

In 1969, Social Welfare submitted a plan to HEW which represented the state as operating a subprofessional program under the laws and regulations pursuant to which Moore sought employment. The program at that time provided for the employment of welfare recipients as homemakers and committed the State to an annual progression of the number of such positions, within agency capability. A-36, 49.

Between July 1969 and December 31, 1969 pursuant to this plan twenty-four (24) part or full-time subprofessional positions were available and filled, all of them homemakers. A-49.

Social Welfare has never amended, modified or withdrawn the plan submitted to HEW during 1969. A-49.

Subsequent to the submission of the plan, and prior to the filing of this suit the Homemaker program was discontinued.

In June, 1973 sixteen (16) full-time Case Aide and trainee positions were created by Social Welfare. The Case Aide trainee positions were made available only to current recipients of welfare assistance, veterans as defined in 20 VSA §1523 and disadvantaged persons. The Case Aide trainee's salary was to be $95.00 weekly. A-50.

Counsel for Social Welfare's contention was the creation of these positions by the Department satisfied its obligations for the employment of low income persons and welfare recipients. A-14, 46.

ARGUMENT

I

A. The Statute and Plaintiffs' Complaint.

State plans for Old Age Assistance, Aid to Needy Families with Children, Aid to the Blind, Aid to the Aged, Blind or Disabled, and Medical Assistance must provide:

"For the training and effective use of paid subprofessional staff with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer programs in providing services to applicants and recipients and in assisting any advisory committees established by the state agency." 42 USC §§302(a)(5)(B), 602(a)(5)(B), 1202(a)(5)(B), 1352(a)(5)(B), 1382(a)(5)(B), 1396a(a)(4)(B), 45 CFR §225. These provisions were added to the Social Security Act in 1967 by Public Law 90-248 §210(a)(1).

Moore and Welfare Rights in their initial complaints alleged that the Vermont Department of Social Welfare was required by these sections to provide for the employment of low income persons and welfare recipients in subprofessional positions. In their Second Amended Complaint, in addition to this Federal Claim they alleged that the State of Vermont had submitted to HEW a plan to recruit and hire low income persons and welfare recipients for subprofessional positions in which the State represented that it was in compliance with the Federal Law and committed itself to an annual progression in the number of subprofessional positions within agency capability.

Paragraph 18 of the Second Amended Complaint alleged, as was later stipulated to in substance by the parties in their proposed pre-trial conference order,

that at the time the plan was submitted to HEW that 24 Welfare recipients and other low income persons were employed as Homemakers. That paragraph also alleged that subsequent to the submission of the plan these positions were eliminated and that an equivalent number of positions was not substituted therefore.

Paragraph 19 alleged that in June, 1973 the Department of Social Welfare initiated a program for the recruitment and training of 16 subprofessionals as case aide trainees.

Social Welfare in their memo dated September 5, 1973 referred to these case aide trainees and to case aides. It contended that the making available of these positions to welfare recipients, certain veterans and disadvantaged persons separate from the state merit system constituted compliance with 45 CFR §225.2 (providing that the state plan must provide for the training and effective use of subprofessional staff as community service aides through part-time or full-time employment of persons of low income and when applicable of recipients).

The positions were described in a circular Social Welfare attached to its memorandum and to which the memorandum made reference. Moore and Welfare Rights

further alleged in Paragraph 19 that the creation of these positions by Social Welfare was insufficient to comply with the level of effort promised in the plan.

Moore and Welfare Rights contention in Paragraph 20 was that the plan submitted constituted a binding contract between the State of Vermont and the United States Government and that the contract could be enforced according to its terms by welfare recipients and low income persons who might obtain employment under programs complying with the plan as the intended beneficiaries of the contract.

B1. Jurisdiction

Jurisdiction in Moore's initial complaint and in the Second Amended Complaint in which he joined with Welfare Rights was based 28 USC §1331 (1970). Welfare Rights in its intervening complaint had also based jurisdiction upon that section. In order for the Court to have jurisdiction under §1331 it is necessary that the amount in controversy exceed ten thousand dollars exclusive of interests and costs.

The court below determined that neither Moore nor the members of Welfare Rights had a right to any

certain job based on the nature of the claim which they asserted.

After the creation of the jobs "neither Moore nor the members of Vermont Welfare Rights Association have a right to the jobs at issue nor is there any guarantee that, if available, they would receive them". Opinion p. 3.

The claim made was that under the Federal law and pursuant to the State plan that Social Welfare must make available employment in subprofessional positions as a fund for the benefit of low income persons and welfare recipients and that after Social Welfare, performing as mandated, had made such positions available that, these positions should be awarded to individuals, including possibly either Moore or members of Welfare Rights, on the basis of merit system competition among such persons.

Merit system competition is provided for by 45 CFR §225.2 which provides with regard to the employment of recipients and low income persons that effective July 1, 1969 the State plan ... must ... provide for.

(1) Such methods of recruitment and selection as will offer opportunity for full-time or part-time employment of persons of low income and little or no formal education, including employment of young

and middle aged adults, older persons and the physically and mentally disabled, and ... of recipients; and will provide that such subprofessional positions are subject to merit system requirements, ...".

The Court's finding, if there is one, with regard to relationship of any wages which might be paid if the positions sought were to be created to the amount in controversy is that the unavailability of jobs "carries with it no direct monetary value". Opinion p. 3. After thus considering the wages the Court went on to find that any damage that the plaintiffs may have sustained was "indirect damage" and too speculative to support jurisdiction junder 28 USC §1331.

It is important to note that this is not made in reference to the actual wages but presumably refers to collateral effects of the receipt of welfare assistance rather than being gainfully employed such as ill health, poor self concept, etc.

In support of the holding with regard to the indirect damages the Court cites cases collected in Rosado v. Wyman, 414 F.2d 170, 176-177 (2d Cir. 1969) rev'd on other grounds, 397 U.S. 397 (1970). The leading case cited was Barry v. Mercein, 46 U.S. (5How.) 103, 12 L.Ed 70 (1847).

Subsequent cases cited by Rosado following the reasoning of Barry were, Kurtz v. Moffitt, 115 U.S. 487, 498, 6 S. Ct. 148, 29 L.Ed 458 (1885). First Nat. Bank of Youngstown v. Hughes, 106 U.S. 523, 1 S. Ct. 489, 27 L. Ed 268 (1882); Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), cert denied, 379 U.S. 1001, 85 S. Ct. 718, 13 L.Ed. 702 (1965), Carroll v. Somervell, 116 F.2d 918 (2d. Cir. 1941); United States ex rel. Curtiss v. Haviland, 297 F. 431 (2d Cir. 1924); and Boyd v. Clark, 287 F. Supp. 561, 564 (S.D.N.Y. 1968), (Three-judge court) aff'd on another issue, 393 U.S. 316, 89 S. Ct. 553, 21 L.Ed. 2d. 511 (1969), (wherein the above cases with the exception of Rosado were first collected).

If the application of Barry to the present matter is restricted to damage other than actual wages it is appropriately cited and the proposition for which it stands, that indirect damage is too speculative to create jurisdiction is correct as applied. Barry in the Circuit Court was a custody fight between the mother and father of a child in which the father sought to obtain custody of the child from the mother. The Circuit Court after hearing disallowed the petition and denied the writ of Habeas Corpus. Before the Supreme Court the issue was whether that court had appellate jurisdiction over the matter based upon The Act of 1789, ch.

20, sec. 22 providing for review when the matter in dispute exceeds the sum or value to two thousand dollars , exclusive of interests or costs.

The claim of each party in Barry was that they had right to custody of the child. Clearly, the value of the right of a party to the child was not certain nor was it ever likely to be knowable. In the Court's terms it was "evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations." Barry v. Mercein, supra at 78.

In Barry it was not enough that the right to the child rose superior to money considerations (and thus might have been very valuable), it was necessary that the right be capable of reduction to dollars.

The proposition for which Barry is appropriately cited is thus: If the damage complained of upon which jurisdiction is based is not capable of reduction into monetary terms jurisdiction does not exist under Section 1331.

The other cases cited by Boyd and Rosado mentioned previously also involve rights which are not capable of being reduced with certainty to monetary terms. Kurtz v. Moffit, supra involved a habeas corpus petition by an army deserter arrested for desertion. The jurisdictional amount question arose on the issue of removal

from the Superior Court where the action was originally filed to the United States Circuit Court. The right therein that the court found to be incapable of valuation was that of personal liberty.

Alleged damages found to be speculative and thus not capable of reduction into monetary terms in the remaining cases were: Financial damage to a National Bank caused by examination of the officers of the bank for tax purposes pursuant to a subpoena by a county auditor, First National Bank of Youngstown v. Hughes, supra: invasion of an individual's personal liberties in the absence of an express allegation of the jurisdictional amount or of facts from which the amount could have been inferred; Giancana v. Johnson, supra; alleged damages in excess of lost wages incurred through the invasion of a citizen's civil rights brought about by dismissal from employment under the WPA for failure to sign an affidavit that he was not a member of the Communist Party. Carroll v. Somervell, supra; damage suffered or to be suffered as a result of an inquisition for lunacy alleged to be a controversy between citizens of different states, United States, ex rel. Curtiss v. Haviland, supra; and, an increased likelihood of induction of persons classified I-A and resulting loss of income to those persons as a result of student deferments, Boyd v. Clark, supra.

In Rosado a statutory claim was made that Section 131-a of the New York Social Services Law, law of March 30, 1969, chapter 184 §5 (1969 Mckinney's Session Laws of New York, 215, 217) violated Section 602(a)(23) of the Social Security Act by reducing the amount of benefits payable to the recipients via standardized grants based on the mean age of the oldest child of recipient families of that size, substantial abolishment of flat grants and by abolishing certain special grants..

The District Court had held that the damages of the individual members of the class could not be aggregated to satisfy the jurisdictional amount and had determined that the monetary loss to each of the plaintiffs did not exceed the $10,000.00 jurisdictional amount. Rosado v. Wyman, Supra at 176. "But after finding that appellees [recipients] could not obtain jurisdiction by showing direct damage of $10,000.00 the district judge decided that the indirect damage they might sustain as a result of the reduced payments was sufficient to satisfy the $10,000.00 requirement." ibid.

It is to the facts stated in the last quotation that the court applies the reasoning of Barry v. Mercein.

The damage referred to is of the sort of threatened injuries to children's physical and mental development caused by reduction of family incomes

substantially below the subsistence level. Rosado v. Wyman, 304 F. Supp. 1356 at 1361 (1969). The relief sought by Moore and Vermont Welfare Rights is employment. "Probable future earnings and retirement and other benefits may be considered in determining whether the $10,000.00 jurisdictional amount requirement of Section 1331(a) is satisfied. Friedman v. International Association of Machinists, 220 F.2d 808 (D.C. Cir) cert. denied, 350 U.S. 824, 76 S. Ct. 51, 100 L.Ed. 736 (1955); Nord v. Griffin, 86 F.2d 481 (7th Cir. 1936), cert. denied, 300 U.S. 673, 57 S. Ct. 612. 81 L.Ed 879 (1937)." White v. Bloomberg 345 F. Supp. 133 (D. Md. 1972).

If the jobs sought had been made available and had been obtained by Moore or members of Welfare Rights the tangible economic benefits in the form of wages to such persons would have been substantial. In the case of Thomas Moore from full-time employment the wages could possibly have amounted to the jurisdictional amount within the period of a year and certainly would have amounted to the $10,000.00 exclusive of interests and costs, within two years. Individually, for the members of Welfare Rights the same would be true. At the outset of this case it certainly could not be said with sufficient surety so as to deny jurisdiction that the wages to be paid for the subprofessional positions sought would amount to less than the jurisdiction amount

annually. St. Paul Mercury Indemnity Co. v. Red Cab Co. 303 U.S. 283, 289 (1938).

Furthermore it could not be said to a legal certainty that Thomas Moore, one or several of the members of Welfare Rights, would not obtain positions once created.

Considering the case aide and case aide trainee positions created and alleged to fulfill Social Welfare's obligation Social Welfare assuming a minimum salary of Ninety-two dollars ($92.00) per week is expending approximately Seventy six thousand and five hundred dollars $76,500.) annually in wages for these positions.

The sixteen case aide and case aide trainee positions created are part of the State Merit System and are permanent positions. Defendants Trial Memorandum Appendix page A-46. As classified positions these employees have as benefits:

a) twelve days paid vacation per year.
b) twelve days paid sick leave earned yearly
c) twelve holidays with pay per year.
d) periodic merit salary increases.
e) social security and contributory retirement.
f) contributory group life insurance.
g) optional contributory group hospitalization.
h) optional major medical insurance coverage
i) a career in public service

attachment to defendants class action memorandum. Appendix page A-23.

Moore and Welfare Rights members, it is true had not asserted that they as individuals had a right to employment. The assertion was that they as low-income persons or welfare recipients had the right to have a certain fund of jobs made available for which they might compete. Moore and Welfare Rights rely for jurisdictional purposes on the fund of these wages to be paid and not upon speculative damages of the sort alleged in Rosado v. Wyman, 304 F. Supp. 1354 (1969). Such speculative damages have not been plead or relied upon in this matter.

Neither Rosado, Boyd, or Barry or the progeny of Barry are cited as support for the proposition that the unavailability of jobs has no direct monetary value to the plaintiffs. That finding is unsupported by authority and is based on a subsequent finding that if the jobs at issue were available that plaintiffs might not receive them. Opinion at p. 3. Treatment of the fund of such jobs and the value to be placed upon them is the crux of Moore and Welfare Rights claims for jurisdiction and instead of acting to deny jurisdiction the finding that neither Moore nor the members of Welfare Rights are guaranteed a job provides an essential element necessary to jurisdiction.

Moore and Welfare Rights believe that the court was correct in its application of the precedents collected in Rosado as stated in the opinion and order but contend that the total amount of monies which would be expended by Social Welfare if they were to prevail is the amount in controversy and there is no contention that this amount would be less than $10,000.00.

Bass v. Rockfeller, 331 F. Supp. 945 (S.D.N.Y.) 1971 is precedent closely in point to the present action. That action was a class action brought by two individuals to challenge the reduction of the availability of Medical Assistance to poor persons by lowering of the income and resources guidelines governing eligibility for Medical Assistance and the elimination of various services previously covered by that program.

It was unclear in Bass whether either of the named plaintiffs met the $10,000.00 jurisdictional amount. id. at page 949. The court therein discussed the distinctions between class actions involving separate and distinct claims and those involving a common and undivided interest, the nature of the matter in controversy and the value of the subject of controversy.

It held that aggregation of the claims of the medically needy was proper and that the amount in controversy was in excess of $10,000.00. id. at 952.

Aggregation in that context is analagous to the rule announced in Pinel v. Pinel, 240 U.S. 594, 36 S. Ct. 416, 60L. Ed. 817 (1916). The Pinel formula has been applied by the First Circuit in Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969) cert. den. 396 U.S. 1037 (1970).

In discussing aggregation the Bass court stated:

> "It has been noted that there exists essentially two tests for determining when aggregations will be permitted. Aggregation of Claims in Class Actions, 68 Col. L. Rev. at 1558-62. The interest in distribution test indicates that a common and undivided claim exists when the adversary of the class has no interest in how the claim is to be distributed. E.G., Shields v. Thomas 58 U.S. (17 How.) 13, 15 L.Ed. 93 (1854). The second test, the essential party test allows aggregation of class claims when none of the class members could bring suit without directly affecting the rights of his co-parties. E.G., Pentland v. Drano Corp., 152 F.2d 851, 852 (3rd Cir. 1945)." Bass v. Rockfeller, supra at 950.

Social Welfare has no interest in which low income persons or welfare recipients receive employment in the positions sought nor, could any low income person or welfare recipient bring such a suit without affecting other such persons.

Based on these tests then, aggregation of the claims of Moore and Welfare Rights would accordingly be in order under Bass if the action had been brought as a class action.

A comparison of the fact in this matter with those in Bass so illustrates. Successful outcome of the suit would force the state to hold state and federal monies for the employment of low income persons and welfare recipients.

These would be held by the state as if it were a trustee for the benefit of all such persons. Employment would be made available to persons similarly situated as Moore and the members of the Welfare Rights, all of whom would compete among themselves for employment. There are no contract rights between the state and the individual plaintiffs and the interests of low income persons and welfare recipients will rise or fall together.

A factual difference from Bass is that this action seeks to compel that several jobs be created and made available on the terms indicated rather than to prevent a cut back in expenditures. This is not a legally significant difference.

Judge Lacey in dictum in Serritella v. Engelman, 339 F. Supp. 738, 746 (D. N.J. 1972) found the discussion of aggregation in Bass to be compelling.

Bass was cited for establishing jurisdiction in Harmony Nursing Home v. Anderson, 341 F. Supp. 957 (D. Minn. 1972).

The 1st circuit in United Low Income, Inc. v. Fisher, 470 F.2d 1074, 1075 n. 1 (1972) found the Bass interpretation to be convincing. Bass was also followed in a related case Bass v. Richardson, 338 F. Supp. 478, 482.

Bass was cited with approval by the court in National Welfare Rights Organization (NWRO) v. The U.S. Department of Health, Education and Welfare, Civil Action No. 264-73, (October 1973,)(D. Ct. D.C.).

The court in NWRO applied the Bass theory that the state was in the position of a trustee holding state and federal money for the benefit of the medically needy to the subject matter of the litigation and found jurisdiction under 1331. id. at p. 7.

The Plaintiffs in NWRO had challenged regulations issued by HEW as not complying with 42 U.S.C. §602, (a)(10) which states that "all individuals wishing to make application for aid to families with dependent

children shall have opportunity to do so and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals ..."

The court in NWRO held that the National Welfare Rights Organization would "fairly and adequately represent the interest of its members and all welfare recipients" and accordingly found it unnecessary to find that the action was a class action. id. at p. 9.

Thus in NWRO jurisdiction was obtained under 1331 in spite of the fact that it was not a class based on the trust theories of Bass.

Welfare Rights alleged in its second amended complaint that it was "an incorporated association which represents the interests of its members in respect to the various public assistance, general assistance and medical assistance programs in effect in Vermont" and that "members of Welfare Rights Organization are subjected to the policies complained of." "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review". Sierra Club v. Morton, 405 U.S. 727, 739, 31 L.Ed.2d 636, 92 S. Ct. 1361.

A decision in this matter would bind the members of Welfare Rights as the court is empowered to grant declaratory and injunctive relief which would run to the entire class of which Welfare Rights is representative.

Accordingly upon the authority of Bass and NWRO jurisdiction should be found to exist for Welfare Rights and Thomas Moore under 1331.

II

Moore and Welfare Rights requested that the court "enter a preliminary and permanent injunction preventing the Defendants from further failing to perform on their contractual and Federal obligations in respect to the hiring of welfare recipients and other low income persons for subprofessional positions" in their second amended complaint. It is permissible to look to the cost of performance to the defendant in order to ascertain the amount in controversy.

"In determining the matter incontroversy we may look to the object sought to be accomplished by the plaintiffs complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgement would directly produce." Ponzio v. Denver & R.G.W.R. Co., 116 F2d 604, 606 (10th Cir. 1940).

The Court of Appeals for the District of Columbia in Tatum v. Laird 444 F 2d 1947, 1951 (1971) rev'd on other grounds, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972) in discussing the Defendants view point ruled in an action where the defendants had not disputed the jurisdictional allegation at the District Court level in a dictum stated that "appellants had no opportunity

to sustain their allegation that $10,000 was in controversy under the doctrine that, particularly where purely injunctive relief is sought the amount in controversy may be measured by either "the value of the right sought to be gained by the plaintiff . . . [or] the cost [of enforcing that right] to the defendant."

The Court therein felt that if a further jurisdictional base had not been present that they would have had to remand to the District Court for the purpose of allowing the Plaintiff "an opportunity to meet their burden of satisfying the District Court that the requisite amount is in controversy." Ibid.

Gomez v. Wilson 477 F 2d 411 (D.C.C.A., 1973) makes reference to the statement from Tatum above quoted and its accompanying footnote with apparent approval stating "[f]or a discussion of how the amount in controversy may be determined when injunctive relief is sought, see Tatum v. Laird 144 U.S. App. D. C. 72, 76 & n. 6, [further citations omitted]." Miller v. Standard Federal Savings and Loan Ass'n 347 F. Supp. 185 (E.D. Mich S. D. 1972) was based on a federal regulation which from the Plaintiff's view as an individual involved less than one hundred dollars ($100.00) per year. However, from the Defendants viewpoint if it had been required to alter the practices challenged for, its whole operation, the cost to the Defendant would have been much greater than $10,000 .

The Court's holding therein was that "[a]lthough lower courts are divided on the issue [citation omitted] the sensible rule in federal question cases requires that if it can be determined from the complaint that 'the value of the object' involves more than $10,000, whether looked at from the viewpoint of the Plaintiff or from the viewpoint of the Defendant, jurisdictional amount is present. This should be specially true in federal question cases, for in such cases the federal court should not strain to dismiss for want of jurisdictional amount." Ibid. p. 188.

Professor Wright after discussing the origin of the "plaintiff viewpoint rule" states that the test for determining the amount in controversy by the pecuniary result to either party "seems the desirable rule." C. Wright, Federal Courts § 34, pp's 117-119, (1970). However, J. Moore, Federal Practice ¶ 0.91[1], (2d ed. 1964) states that the "prevailing note of the decisions is that the amount in controversy should be determined from the standpoint of the Plaintiff."

Based on the authorities cited this court should adopt and apply the defendant's viewpoint rule to this controversy.

From the viewpoint of the defendant the cost of the object of this lawsuit is clearly in excess of $10,000 based both on the costs incurred by Social Welfare in implementing the employment plan subsequent to the initiation of this lawsuit which it claims satisfies its obligations to hire low income

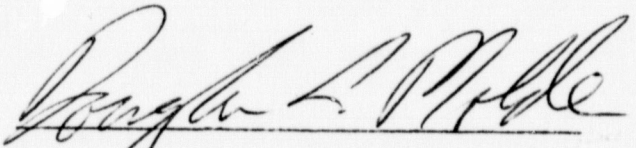
persons and welfare recipients and upon the facts alleged in Plaintiffs' complaint setting out the contents of Defendants' plan, the initial number of persons employed pursuant to that plan and the subsequent complete dismantling of that program.

CONCLUSION

Based upon both the common fund theories as enunciated by Bass and upon the valuation of the amount in controversy from the defendant's viewpoint, this matter was properly before the District Court and Moore and Welfare Rights respectfully request that it be so ordered. Submitted this 12th day of April, 1974.

Thomas Moore

Vermont Welfare Rights Association

by 

Douglas L. Molde
Vermont Legal Aid, Inc.
P.O. Box 589
St. Albans, Vermont 05478